ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	CS Docket No. 96-60
and Competition Act of 1992	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	

REPLY COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

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SUMMARY

The Small Cable Business Association submitted a comprehensive analysis of the Commission's leased access proposed rules and specific suggestions to remedy their harsh impact on small cable. Numerous leased access programmers filed comments that, while critical of the cable industry, supported many of SCBA's assertions:

- **Small cable has not impeded development of leased access.** The commentors that cite specific instances of alleged cable resistance to provide leased access all name larger operators. The programmers have ignored small cable as a potential leased access outlet for the past 12 years.
- **Fixed rate alternatives ignore the high per subscriber costs of small cable.** Numerous programmers advocate adoption of uniform nominal rates for leased access ranging from fractions of a cent to a few pennies per subscriber per month. These rate structures fail to recognize the high per subscriber costs of small cable and would constitute an illegal subsidization of leased access.
- **Small cable provides significant local programming.** Many low power television stations and other programmers claim they are the sole source of local programming and therefore deserve protected and preferential status. Despite its high per subscriber cost, over half of SCBA's members responding to a recent survey reported that they provide local origination programming. Preference for particular classes of programmers is not permitted by the statute or supported by the facts.

Despite the emotional appeals that the business plans of potential leased access programmers are doomed to bankruptcy unless low cost access is provided, the Commission

cannot lose sight of important Congressional mandates when crafting the leased access rules. Leased access was intended to remove a cable operator's editorial discretion over the programming carried on certain channels. It was not intended to guarantee certain programmers access or to ensure the survival of programs that were not commercially viable. Leased access is only a delivery vehicle. Leased access cannot become an economic subsidy by any operator, especially not by small cable.

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I. INTRODUCTION

Responding out of concern for the total disregard of the disparate impact of the Commission's proposed leased access rules on small cable, the Small Cable Business Association ("SCBA") filed comprehensive comments providing both critical analysis and constructive solutions. The positions adopted by leased access programming interests in comments filed in this Docket validate many of the concerns raised by SCBA. SCBA highlights these issues to assist the Commission in its review of the impact on small cable of the proposed leased access rules.

II. SPECIFIC ALLEGATIONS OF NONRESPONSIVENESS TO LEASED ACCESS REQUESTS WERE LIMITED TO LARGE OPERATORS.

A. Small Cable has not Stonewalled Leased Access; Programmers have Ignored Small Cable.

Many programmers filing comments make broad allegations of "stonewalling"[1], "hostility"[2] and "ruthless"[3] behavior on the part of cable operators toward leased access programmers. Those that name specific cable operators who have allegedly not complied with leased access requests name large operators.[4] Small cable has not hindered the development of leased access programming because programmers have had no interest in using small cable as an outlet. The SCBA member survey that showed that the vast majority of responding members had not received a single leased access information request over the last five years.[5]

Leased access programmers' interest in small cable is only now beginning to bud because the Commission's proposed leased access formula grants **free** access to small cable. Lack of programmer interest over the last twelve years does not justify the imposition of remedial measures by the Commission with respect to small cable.

B. Commentors Offer No Justifications for Imposing Punitive Sanctions on Small Cable.

Several programmers advocate the imposition of harsh penalties for any operator found to have charged higher than permissible rates. Suggested penalties include refund of ***three times***

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[1]Sherjan Broadcasting Co. at 2.

[2]United Broadcasting Corporation, D/B/A TELEMIAMI at 2.

[3]*Id.*

[4]*See, e.g.*, WZBN TV-25 at 1 and BCB Broadcasting, Inc. at 2.

[5]SCBA Comments at 28

all monies paid by the programmer and imposition of fines by the Commission.[6] The commentors fail to provide any justification for these punitive measures. Presumably, the alleged uncooperative history of the "vast majority of cable systems"[7] should justify these overreaching sanctions. Whether or not these are justified for the industry remains an issue for academic debate. The history of small cable, however, is devoid of culpable conduct. The Commission should not entertain any considerations of imposing such onerous provisions on small cable.

III. ESTABLISHING MAXIMUM PER SUBSCRIBER RATES IGNORES THE UNIQUE COST STRUCTURES OF SMALL CABLE.

A large number of programmers urge the Commission to adopt absolute rate ceilings based on de minimis per subscriber amounts.[8] The simplicity of fixed per subscriber amounts belies their danger. The commentors proposing these amounts that range from $0.0025[9] to $0.08[10] fail to present any rationale or evidence to support the amounts. Further, low per subscriber amounts ignore the reality of high per subscriber costs incurred by small cable -- costs that were extensively discussed and documented in SCBA's comments.[11]

Some Commentors attempt to overcome these concerns by proposing an appeal mechanism where operators with higher costs, or those who sought to recover transactional costs, could seek

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[6] *See, e.g.*, Landmark Broadcasting Ltd. at 2.

[7] Sherjan at 2.

[8] *See, e.g.*, Broadcasting Systems, Inc. at 2 and Vernon Watson WBOP TV-12 at 4.

[9] Broadcasting Systems, Inc. at 2.

[10] Blab Television Network, Inc. at 6.

[11] *See* SCBA Comments at 16-22.

waivers from the Commissio r to charge higher leased access fees.[12] As explained in SCBA's Comments, the cost of seeking relief on an individual case basis, especially where the Commission recognizes higher operating costs exist, wastes industry and Commission resources, only raising the cost of leased access.

The comments of the Hispanic Information and Telecommunications Network ("HITN") reveal the true rationale behind the fixed rate proposals. HITN urges the Commission to "focus...upon the Congressional policy to foster competition and diversity ***rather than the financial well-being of cable operators***."[13] HITN advocates that the Commission abandon concerns about compensating cable operators[14], even advocating that the charge in many instances should be "nominal".[15] These approaches directly conflict with the Congressional mandate, however, that cable not subsidize leased access.[16] The pricing proposals by the various programmers are without basis, self-serving and conflict with Congressional mandates. The Commission must establish rates that are fully compensable, recognizing that the cost for small systems to provide leased access is high when measured on a per subscriber basis.

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[12] *Id* at 7.

[13] HITN at 14.

[14] *Id* at 15.

[15] *Id* at 17.

[16] SCBA Comments at 3 and 7..

IV. PREFERENCE SHOULD NOT BE GIVEN TO LOW POWER TELEVISION AND OTHER "LOCAL" PROGRAMMERS BECAUSE THEY ARE NOT THE EXCLUSIVE SOURCE OF LOCAL PROGRAMMING.

A large number of owners and operators of low power television stations filed comments pleading for special preferences to save their businesses. Most low power commentors ask the Commission to use the leased access rules to remedy the harm incurred when Congress expressly refused to grant most low power stations must-carry rights.[17] Some make emotional appeals to give preference to save "my life's savings and my kids future...."[18]

The fact remains, however, that Congress made an important public policy decision not to grant low power signals must-carry rights. A Commission grant of preferences to confer similar carriage rights through low-cost preferential leased access provisions would blatantly circumvent the policy decision made by Congress. Also, no matter how emotional the appeals, the federal government has never and should never become the guarantors of the economic viability of any communications enterprise. Small cable has never asked for such guarantees, only relief from unreasonable regulatory restrictions and burdens.

Other low power stations argue that they should receive preferential treatment because they are the sole source of local community programming.[19] Not only is this proposition unsupported by the leased access statute, many small systems, despite the high per subscriber cost, provide local origination programming. A survey of SCBA members revealed that more than half (53%) of those responding provide locally originated community programming.

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[17]One commentor even asks the Commission "Way do they [full power stations] get Must Carry?" Erwin Scala Broadcasting Corporation at 2.

[18]Vernon Watson WBOP TV-12. Mr. Watson plainly asks the Commission for protectionist provisions: "I often wondered why did the FCC create a much needed service like LPTV and not create rules or incentives to protect it [sic] existence."

[19]*See, e.g.*, WZBN TV-25 at 2.

V. COMMERCIAL ADVERTISING PROGRAMMING SHOULD NOT HAVE ACCESS TO LEASED CAPACITY OR RATES.

SCBA raised concerns that the provision of free or low-cost leased access would exponentially increase demand for leased access. Inexpensive or free leased access will encourage public access and commercial advertisers to seek leased access capacity. As outlined in SCBA's Comments, free/low cost or subsidized leased access violates statutory and Congressional mandates.[20] Access Television Network also cites judicial precedent that commercial advertising providers cannot demand leased access capacity.[21] The authority cited by Access Television Network's should encourage the Commission to expressly restrict by regulation the ability of commercial advertisers to demand leased access capacity and rates. This clarification, while important, does not lessen the need for the Commission to craft leased access rates that are fully compensatory for small cable.

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[20]SCBA Comments at 3 and 7.

[21]Access at 5 ("In *Sofer v. United States*, No. 2:94cv1182, slip op. At 8 (E.D. Va. June 7, 1995) the court held that 'the leased access provision of the Cable Act and related regulations...have no application to commercial advertising.'")

VI. CONCLUSION

SCBA has presented this Commission with comprehensive analyses of the disparate burdens the Commission's proposed regulations wrongfully place on small cable. The comments filed by many leased access programmers and other interested parties validate SCBA's analysis and support its proposed modifications. SCBA respectfully requests that the Commission address the issues and adopt the recommendations contained in its Comments.

Respectfully submitted,

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